

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

ORIGINAL

77-4196

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—and—

ELMSFORD SHEET METAL WORKS, INC.,

Intervenor,

—against—

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,

LOCAL UNION No. 38,

Respondent.

**BRIEF AMICUS CURIAE SUBMITTED ON BEHALF OF
SHEET METAL AND ROOFERS EMPLOYERS
ASSOCIATION OF SOUTHEASTERN
NEW YORK, INC.**

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BRIEF AMICUS CURIAE SUBMITTED ON BEHALF OF SHEET METAL AND ROOFERS EMPLOYERS ASSOCIATION OF SOUTHEASTERN NEW YORK, INC.

Facts

The underlying facts in the present case are not in dispute, and are set forth fully in the brief of the National Labor Relations Board and the Sheet Metal Workers International Association, Local Union No. 38 submitted previously.

The only fact that may be in dispute concerns the Union's request for its members to attend an informational meeting on December 1, 1976 instead of reporting to work. The employer interpreted this as a threat of a strike, but as

the meeting never did take place and all employees reported to work as scheduled, this cannot be grounds for a coercion or restraint violation.

POINT I

Whether the Board properly found the industry promotion fund provision to be a non-mandatory subject of bargaining and that the union's insistence on its inclusion in the agreement violated Section 8(b)(3).

What is considered a mandatory subject of bargaining has been an expanding concept since the passage of the National Labor Relations Act. Although the decisions have indicated that an industry promotion fund has not been a mandatory subject of bargaining, it is urged upon the court that the time is ripe to reassess that determination in view of today's conditions.

It is submitted that in the expanding concept concerning terms of employment that an industry promotion fund today can very well fit within the statute's conception of what is a mandatory item of bargaining.

As set forth in the agreement itself (Article VIII, Sections 12, 13) the industry promotion fund is to promote the industry and, in turn, improve employment opportunities for unit employees through increased business opportunities for the employer. The determining factor at issue is whether the fund affects the terms and conditions of employment so as to be a mandatory subject of bargaining.

If it is assumed that an industry fund performs its function and fulfills its purpose and, because of such, the industry either employs more persons, or, if it is a dying

or declining industry, the rate of decline is lessened, then the fund has a direct impact on the continued employment of that portion of the labor force.

Examples are numerous as to what happens to employees in a declining industry. The consequences are probably most accurately described in a declining industry by Matthew M. Lind, Ph.D., executive director of the Pension Benefit Guaranty Corporation, Washington, D. C., who, in addressing the International Foundation of Employee Benefits Plans in November of 1976, stated:

"The corporation became trustee of three jointly administered plans covering millinery workers employed in the hat industry in New York City. These three plans started in the early 1950's, at which time they had 10,000 participants and cost 2% of payroll . . . changing fashions resulted in a tremendous decline in the hat industry. At the time of plan termination, December 31, 1976, the initial 10,000 participants had decreased to 4,000, of which 2,700 were either retired or eligible for retirement.

Simultaneously, because of the shrinking active work force and the large number of retirees, the cost of the pension plan had gone from 2% of the payroll to almost 11% in this low wage industry. The situation became one where the interests of the active worker were pitted against the interests of retirees. The burden of the pension plan was falling very heavily on active workers and almost all of their contributions were going to pay current benefits of retirees. In our judgment, those three millinery plans had no choice but to terminate."

The problem of an industry which has not been fostered and advanced is not unknown to the courts. The industry advancement fund is, in fact, more important in a declining industry than in a growing one. The U.S. Court of Appeals (3d Cir.) in passing on a declining industry (coal) faced the problem of a competition between remaining members of the industry and retirees for pension fund benefits. See *Nedd v. United Mine Workers*, 556 F.2d 190 (1977). The District Court (New Jersey) had to resolve a conflict between employees and retirees in a declining industry in *Hurd v. Hutnick*, 419 F. Supp. 630 (1976). These cases and the article by Dr. Lind serve to emphasize the vital and direct relation between industry funds and employment in that such funds significantly affect the unit employees' potential income by attempting to assure the continued existence of business for the employer and the resulting job opportunities for employees. With industry funds accomplishing their purpose the problems in *Hurd* (supra), and *Nedd* (supra), would be reduced if not eliminated, resulting in increased employee and retiree income and security. Profoundly disruptive and divisive confrontations and conflicts would be avoided.

Any plan or negotiation which has as its ultimate purpose continued employment and ultimate job security should be considered a mandatory subject of bargaining. It is incongruous, to say the least, that it is legitimate to bargain to impasse with respect to a guaranteed annual wage of employees but not to bargain for the means to preserve an industry in which those very employees would work.

Dues checkoffs, which in reality have nothing to do with terms and conditions of employment, are a subject of bargaining. The ultimate purpose of the dues checkoff is the

preservation of the union. It is only logical that the industry fund, the purpose of which is the preservation of the industry, be a subject of bargaining. To allow one and not the other is a perpetuation of a disparity between bargaining parties.

It is respectfully submitted that the industry promotion fund is a vital issue regarding the terms and conditions of employment, as it looks to the very continued existence of employment. Without at least a stabilized industry, or an industry that looks to the future, all other issues of bargaining are conducted in a vacuum, by avoiding the very reason d'être.

The federal government has preempted the field of welfare and pension plans by virtue of the Employee Retirement Income Security Act (ERISA, Public Law 93-406), and through the Pension Benefit Guaranty Corporation set up thereunder, has undertaken the problem of what to do with multi-employer plans in declining industries. Not having arrived at a solution, the government has merely extended the time in which to address the problem (HR 9378 signed by President Carter as PL 95-214). One solution would be industry promotion funds. If such funds were mandatory subject of bargaining they could go a long way in preventing the problems inherent in declining industries and could, conceivably, even prevent industries from beginning the long decline to oblivion with the concomitant upheaval of employees and retirees.

POINT II

Whether the Board properly found respondent union restrained and coerced the employer in its choice of a representative for purposes of collective bargaining in violation of Section 8(b)(1)(B).

Unless a labor organization has restrained or coerced an employer there cannot be an 8(b)(1)(B) violation.

Section 8(b)(1)(B) states:

“(b) It shall be an unfair labor practice for a labor union or its agents . . .

(1) to restrain or coerce . . .

(B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievance.”

In the present case, no conduct on the part of the Union could be said to have restrained or coerced employer Elmsford. The Union's sole act, characterized as restraint and coercion by the NLRB, consisted in invoking a contractually agreed upon provision which provided a specific method to resolve grievances. That certainly cannot be coercion. Both parties had previously agreed to such grievance settling procedure, in their contract of 1974-75, and Local 38 was only acting pursuant to its contractual rights in submitting the unresolved issue regarding inclusion of the interest arbitration clause (Article X Section 8) to the National Joint Adjustment Board. See *Winston-Salem Printing Pressmen v. Piedmont Publishing Co.*, 393 F.2d 221 (CA 4, 1968); *Nashville Newspaper Printing Pressmen*

v. *Newspaper Printing Corp.*, 518 F.2d 351 (CA 6, 1975). The contract was still in force by virtue of its Article XIII Section 1. By its decision, the NLRB, in effect, sanctioned the employer's breach of contract by designating the Union's insistence or adherence to the contract terms, as unlawful. There is nothing inherently unlawful about the voluntary agreement to preclude bargaining of the parties themselves as to the final resolution of disputed matters. The employer here had, in fact, agreed to the interest arbitration procedure in the agreement with Local 38 of Sept. 18, 1975.

Interest arbitration clauses have been held to be perfectly legal and legitimate methods of dealing with disputes.

The Court, in *Chattanooga Mailers v. Chattanooga News-Free Press*, 524 F.2d 1305 (CA 6, 1975), stated that, "nothing would be more out of step with our national labor policies than for courts to refuse to enforce a voluntary agreement to arbitrate differences".

A provision to arbitrate when agreement upon a new contract proves impossible, as is the case here, is part of an existing agreement and refusal to comply therewith constitutes a breach. The drawing of a new contract will be in the hands of an arbitrator where the parties chose to place the authority and responsibility. The court is asked to do no more than enforce a provision of an existing contract, a traditional judicial function." 393 F.2d at 227.

In addition, it is noted, in the regulation of the Federal Mediation and Conciliation Service, issued pursuant to the Labor-Management Relations Act, that:

Voluntary arbitration is encouraged by public policy . . . also in appropriate cases voluntary arbitration or

fact finding are tools of free collective bargaining and may be desirable alternatives to economic strife in determining terms of a collective bargaining agreement. 29 C.F.R. §1401.1

It cannot be said that the mere exhausting of contractual procedures constitutes restraint or coercion of an employer within the meaning of Section 8(b)(1)(B). This is clearly set forth in *Turner-Brooke Inc.*, 161 NLRB 229, 22 (1966), in which a union adamantly insisted that its employer sign an agreement requiring the employer to contribute to trust funds. The Board found that:

"mere insistence is not to be equated with the restraint and coercion required by the statute for a Section 8(b)(1)(B) violation." (161 NLRB at 235)

See also: *Detroit Resilient Floor Decorator Local Union 2265*, 135 NLRB 769 (1962). Here the Union is insisting on a contractually agreed upon provision.

In *Sheet Metal Workers Local 28*, 222 NLRB No. 110, 91 LLRM 1240, (Feb. 5, 1976), the Board was confronted with the same issue, namely whether filing a grievance before a contractual tribunal threatened, restrained or coerced an employer. In holding that it did not, the Board underscored its previous decisions in *Associated General Contractors of California*, 207 NLRB 698 (1973) and *Kimstock Div., Tridair Industries*, 207 NLRB 711 (1973) that the enforcement of rights solely by means provided in the collective bargaining agreement was not conduct which threatened, restrained or coerced within the meaning of Section 8(b)(1)(B). The Board said:

"By instituting the grievance proceeding against General Sheet Metal, the Respondent merely 'sought to enforce certain provisions of (its) bargaining agreement through peaceful means provided by the agreement and by no other means.' As the Board stated in *Associated General Contractors* (supra) at 700:

'(A) contractual agreements, such as we have before us, for compensation of a breach of contract determined by contractually fair procedure is a reasonable and peaceful method of resolving a dispute. Consequently, we find the Union's use of its contract in its dispute with Ohland, did not constitute the statutory proscribed threat, coercion or restraint.'" (91 LRAM at 1244).

Nothing the Union has done in the present case, can remotely be considered as physical force or threats of force or economic reprisal as an attempt to have the employer agree to the contract containing the disputed provisions. Without such conduct the Board cannot act under Section 8(b)(1)(B).

CONCLUSION

It is respectfully submitted that the Court of Appeals decline to enforce the order of the National Labor Relations Board.

Respectfully submitted,

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Norman Friedman , being duly sworn, deposes
and says, that on the 10th day of February 1978 , ~~at xxxxxx's book~~

~~Mr~~ he served the annexed Brief Amicus Curiae submitted on Behalf
of Sheet Metal and Roofers Employers Assn. of Southeastern New York, Inc.
No. 77-4196

upon See Second Sheet

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for See Second Sheet

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